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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1264

TABER INSTRUMENT CORPORATION, JOSEPH P. D'ANGELO, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK–WESTERN,

Petitioners,

v.

JUNIA E. RAAB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioners,

v.

JUNIA E. RAAB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Appendix A of Petition) is reported at 546 F 2d 522. The opinions of the district court with respect to the motion to dismiss (Appendix B of Petition) and to the motion to set aside the judgment of dismissal (Appendix C of Petition) are not reported.

Jurisdiction

The opinion of the Court of Appeals was filed December 13, 1976. The petitioner seeks to invoke jurisdiction of this Court under Section 28 U.S.C. § 1254 (1).

Question Presented

The question presented is whether the Court of Appeals was justified in deciding that it was an abuse of discretion for the district court to dismiss for failure of prosecution under the facts and circumstances of this action and its companion action.

The petitioners' characterization of the issue is in error and misrepresents the basis upon which the Court of Appeals made its determination.

Statement of Facts and of the Case

The presentation in the Petition of the pertinent facts and circumstances of the litigation is so seriously at variance with the record as to compel Respondent to set forth the following Statement of the Facts and of the Case.

Plaintiff is a former employee and shareholder of defendant Taber Instrument Corporation (TIC), which corporation on June 3, 1966, purchased from plaintiff all of his 600 shares of TIC for $8 per share, or $4,800. One month earlier, TIC had purchased from another stockholder and former employee, JOSEPH F. LESS (Less), 14,100 shares of its stock for $10 per share, or $141,000. Thereafter on December 30, 1966, TIC was acquired by TELEDYNE, INC. for $50 a share. In May, 1967, Less and Raab filed suits in the district court

(*Less* on May 9 and *Raab* on May 10), based upon violations of Sections 10b, 27 and 29 of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission, each alleging that TIC purchased his stock without disclosing that serious negotiations were in progress to sell TIC to Teledyne for a much higher price than he received for his stock; each sought rescission or, if rescission were for any reason denied, money damages, *i.e.*, $1,400,000 in *Less* and $60,000 in *Raab*. Both Less and Raab were represented by the same counsel, and the defendants were represented in both actions by the same respective counsel.

The two actions shared nearly identical issues of fact and law, similar answers were interposed by the defendants, and accordingly the cases were consistently treated as companion cases by all parties and the court throughout the proceedings, with *Less* the lead case because of its far greater magnitude. 2d Cir. App., pp. 177, 297, 613, 617. In each case the defendants adopted the position that there was no failure to disclose a material fact, asserting that at the time of the purchase of the stock by TIC the negotiations with Teledyne were not of sufficient importance to require disclosure. 2d Cir. App., p. 245.

Extensive discovery was taken in furtherance of both actions. In all, including the last depositions taken by the defendants in October, 1972, 24 depositions were taken (16 by the plaintiffs and 8 by the defendants) consisting of many hundreds of pages of testimony, and more than 200 exhibits were examined and marked. 2d Cir. App., pp. 5, 238.[1] The completion of the discovery was repeatedly delayed at the in-

[1] In addition, the plaintiffs sought unsuccessfully in 1971 to take the depositions of Teledyne, a California corporation, and defendant Himmelfarb, a resident of Mexico. 2d Cir. App., pp. 251, 253, 385, 387, 638.

stance of the defendants because of conflicting engagements of their counsel, and plaintiffs' counsel frequently protested such delays. 2d Cir. App., pp. 248, 272-276, 288-289, 290-296, 343-344. It was understood and agreed by counsel for all parties from the beginning, although without a formal stipulation on the record, that the basic discovery common to the central issue in both actions, which was the timing and character of the Teledyne negotiations, was being taken in *Less*.

Following the conclusion of plaintiffs' discovery, the plaintiffs filed notes of issue in both *Less* and *Raab* in October, 1971, for the November, 1971, trial term.[2] At the call of the trial calendar for that term the plaintiffs answered both cases ready for trial. 2d Cir. App., pp. 333, 344-345.

Thereafter the progress of the two actions to trial was continually regulated and supervised by the court. There were joint pretrial conferences held before U. S. Magistrate Maxwell on August 17, 1972, and February 7, 1973, and joint pretrial conferences and meetings held before the District Judge on March 13, 1973, February 7, 1974, April 29, 1974, and June 3, 1974. On each of these occasions plaintiffs' counsel stated that plaintiffs were ready for trial in both *Less* and *Raab*. However, at the August, 1972, conference before the Magistrate, counsel for defendants requested time to take additional depositions, and they were subsequently taken in October, 1972, pursuant to notices served by the defendants after the August, 1972, conference. The next pretrial conference was held by the Magistrate on February 7, 1973, at which time the defendants reported that they were now ready in both actions. In the course of settlement discussions, attorney McDonough, who was counsel in both *Less* and *Raab* for defendants TIC, Taber, Hildebrandt and Manasen, stated that he felt there would be little difficulty in arriving at settlement of *Raab* once *Less* was resolved, and plaintiffs' counsel said they agreed. 2d Cir. App., pp. 254-255, 342. At the close of that conference the Magistrate stated that he would refer both actions to the district judge for the scheduling of trial. 2d Cir. App., pp. 101, 113, 267.

[2] Local Rule 12 formerly required that a new note of issue be filed for each successive term. After 1971 that Rule was discontinued, and it was no longer necessary to file additional notes of issue for a case to retain its position on the trial calendar.

Subsequently the progress of the two cases was interrupted by various matters beyond the control of the plaintiffs, including the death of defendant Ralph Taber, the lapse of nearly five months before executors of his estate were appointed, and delays while the defendants made arrangements for the appointment of counsel for the Taber estate and of substitute trial counsel for defendants TIC, Manasen and Hildebrandt in place of Mr. McDonough, who was precluded by the canons of ethics from acting as trial counsel because of his status as a potential witness in both actions.

At the June 3, 1974, conference, it was agreed by the court and counsel for all parties that *Less* be tried first and that trial of *Raab* be deferred until after disposition of *Less*. Plaintiffs' counsel asked for an early trial date, but counsel for TIC and the Taber estate stated that other commitments would prevent them from proceeding to trial before the latter part of October, 1974. The court therefore scheduled *Less* for trial on October 15, 1974, and directed that *Raab* be deferred. The foregoing agreement was confirmed by order of the court dated June 14, 1974. 2d Cir. App., pp. 164-166.

The *Less* trial date was later adjourned three weeks to November 5, 1974, at the request of the defendants and over the objection of plaintiffs' counsel. 2d Cir. App., p. 286.

Attorney McDonough subsequently died on August 16, 1974. Substitute trial counsel had already taken over representation of all parties formerly represented by him, and the preparations for trial of *Less* on the court scheduled date continued without interruption. On the eve of trial, November 4, 1974, *Less* was settled for $560,000. The next day the district court approved the settlement and allowed the defendants 30 days in which to pay the settlement amount. The settlement was paid on December 3, 1974, and an order of dismissal on settlement entered that date. 2d Cir. App., p. 11.

There followed negotiations in December of 1974 and January of 1975 regarding settlement of *Raab*. They proved unsuccessful, and plaintiffs' counsel promptly notified the court clerk on January 24, 1975, requesting a meeting with the district judge to arrange for trial. 2d Cir. App., pp. 264-265.

Upon notice dated February 13, 1975, a conference was held before the district judge on March 19, 1975. Plaintiffs' counsel requested that the case be set down for trial, since the further settlement negotiations had been unavailing. Despite the fact that attorney McDonough had reported both *Less* and *Raab* ready for trial on February 7, 1973, the substitute counsel for TIC and the Taber estate now said that additional discovery was needed, and requested leave to serve interrogatories and possibly take other discovery. Over the objection of counsel for plaintiff, the court gave defense counsel until May 1, 1975, to serve interrogatories and established a timetable for completion of any further discovery by August 1, 1975. On April 29, 1975, instead of serving such interrogatories, defendants served a motion to dismiss for failure of prosecution, claiming prejudice from the loss of Mr. Taber and Mr. McDonough as trial witnesses.

The plaintiff submitted affidavits in opposition to the motion, disputing in many important respects the facts set forth in the defendants' affidavits, and finally on November 25, 1975, after hearing argument, but without conducting a hearing as to the controverted factual matters, the court granted the motion to dismiss.

The plaintiff filed a motion to set aside the judgment of dismissal pursuant to Rule 60(b) F.R.Civ.P., calling to the court's attention matters of record refuting essential findings of fact upon which the decision of dismissal was made. 2d Cir. App., p. 374. Plaintiff also filed a notice of appeal from the judgment of dismissal. 2d Cir. App., p. 439. On March 9, 1976, after receiving opposing affidavits and briefs, but without conducting a hearing as to the controverted factual matters, the district court denied plaintiff's motion on the basis of lack of jurisdiction in view of the docketing of the appeal, and stated that even if it had jurisdiction it would deny the motion. 2d Cir. App., pp. 556-558.

On March 12, 1976, plaintiff filed a notice of appeal from the denial of the motion under Rule 60(b).

By order of the Court of Appeals, both of the appeals were consolidated for hearing.

The Court of Appeals unanimously reversed the dismissal. After reviewing the entire proceedings in both *Less* and *Raab*, the Court of Appeals ruled that the conduct of the court and counsel in both actions from June 14, 1974, on, clearly made it an abuse of discretion for the district court to grant the defendants' motion for dismissal.

In view of this decision, the Court of Appeals found it unnecessary to act upon the denial of plaintiff's motion under Rule 60(b).

The petitioners' brief is replete with purported statements of fact which are without foundation in the record.

In straining to defend the dismissal by the district court, the defendants throughout their brief have resorted to many representations which are without foundation or are at variance with the record. In particular, the Court's attention is called to the following matters:

1. At page 3 of their brief, defendants explain the June, 1974, agreement of all counsel to the court's proposal that the *Less* case be scheduled for trial and that trial of *Raab* be deferred until after disposition of *Less*, as follows:

> This was thought to be necessary because the same lawyers represented plaintiffs and defendants in the two cases, and the proceedings could not be conducted simultaneously.

In truth, that agreement was based upon the express understanding of counsel and the court that the practical procedure was to resolve the issues common to both cases in the *Less* case, in view of the consensus that once *Less* was resolved *Raab* could readily be settled along the same lines. 2d Cir. App., pp. 254-255, 281, 341-342, 383-384, 402, 406.

2. At page 4 of their brief, petitioners make the statement that plaintiff's only discovery in *Raab* consisted of a single deposition and that "plaintiff did not evince any interest in further discovery or in means to narrow the issues at trial."

In fact, almost all the depositions taken in *Less* relating to the negotiations between Teledyne and TIC (*e.g.*, depositions of Taber, D'Angelo, McDonough, Hildebrandt, Till and Manasen) are crucial to the issues in the *Raab* case. Furthermore the depositions in *Less* relating to the negotiations of various parties with Joseph Less for the purchase of his

stock (*e.g.*, depositions of Taber, D'Angelo, Hildebrandt, Bartlo, Manasen, McDonough, Less, Till, Murphy and Sweet) are also important and relevant to *Raab*, since the sudden interest and activity of the TIC insiders in buying Less's stock is a strong indication that the Teledyne/TIC negotiations had in fact reached a significant stage by the spring of 1966.

3. At page 4 of their brief, petitioners indicate that they first became aware of their alleged serious prejudice after the March, 1975, pretrial conference (in which they requested and were granted time for further discovery) when they assessed the state of their case in light of the loss of Mr. Taber and Mr. McDonough, and that they were then compelled to elect not to commence discovery but move instead to dismiss. The Court of Appeals aptly dealt with that argument as follows:

> The appellees now claim that because of the deaths of important potential witnesses (Taber, who died in February, 1973 and McDonough, who died in August, 1974) they have been seriously prejudiced by the delay. At the time of appellees' agreement with the order of June 14, 1974, Taber had no longer been available for over fifteen months, but his death was no obstacle to their agreement in the order, and McDonough's death in August, 1974 did not deter the parties from a continuance of trial preparations and settlement conferences for a year thereafter.

Furthermore, the record shows that present counsel for the petitioners had obviously fully familiarized themselves with every aspect of both *Less* and *Raab* long before March, 1975, for they filed in March, 1974, an extensive and minutely detailed memorandum in opposition to the plaintiffs' motion to consolidate the two cases. 2d Cir. App., pp. 139-160.[3]

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[3] The Siemer firm, substitute counsel for TIC and the Taber estate, had been actively involved with both *Less* and *Raab* since the summer of 1973, although they were not formally substituted as counsel in *Less* until February, 1974, and in *Raab* until March, 1974. 2d Cir. App., pp. 256-258.

In addition the petitioners fail to inform the Court that Mr. Taber had been examined extensively regarding the matters common to both *Less* and *Raab, i.e.*, the Teledyne negotiations, the acquisition of TIC and its liquidation, in depositions covering 320 pages, with over 40 exhibits (Transcripts R. 62, 63, 64), and that he did not directly participate in the negotiations for the purchase of Raab's stock. 2d Cir. App., p. 53.

As the record shows, Mr. McDonough was also examined in detail regarding the Teledyne/TIC transactions, the liquidation of TIC and the negotiations for the purchase of both the Less and ... Raab stock. He testified that he alone conducted the negotiations with Raab's then attorney, Franklin Ness, for Raab's stock, that he had by then personal knowledge of the Teledyne negotiations and that he made no disclosure of them to Mr. Ness. He testified fully as to the facts within his knowledge concerning the matters pertinent to the issues of this action, *i.e.* whether Raab is entitled to rescission of the sale of his stock by virtue of nondisclosure of a material fact, the Teledyne negotiations. 2d Cir. App., pp. 53-80; R. 74, 76.[4]

4. With regard to the reference at page 5 of the petition regarding warnings of possible dismissal given "on numerous occasions," there is no substantiation for same in the record, and the defendants in their affidavits in the district court proceedings cited no such instance. Nowhere in the entire record of the proceedings in *Less* or *Raab* is any such warning recited or referred to by the court or anyone else. Transcript of Proceedings March 19, 1975, 2d Cir. App., pp. 394-408; Combined Transcript, R. 167.

[4] Reference "R" is to the Supplemental and Revised Index to Record on Appeal, of documents not reproduced in the 2d Cir. Appendix.

5. Also at page 5 of their brief, the petitioners state without substantiation and erroneously, that prior to the 1974 settlement of *Less* plaintiff twice faced dismissal and four times failed to comply with court orders. In fact, as the record shows, this action came up once, and only once, on the dismissal calendar,[5] and it was removed therefrom routinely in accordance with district court practice upon receipt by the court of the letter from plaintiff's counsel of June 12, 1970, pointing out the relationship between *Less* and *Raab* and referring to the discovery proceedings previously taken and then in progress in *Less* affecting both cases. 2d Cir. App., p. 297.

As to the plaintiffs' alleged failure of compliance in filing a pretrial statement, it was commonly accepted practice in the district court to defer the filing of a pretrial statement, notwithstanding the wording of the *pro forma* order accompanying a notice of pretrial conference, since it might be determined at the conference that the case was not really ready for a final conference and the statement would therefore be premature or incomplete. This the U. S. Magistrate has confirmed. 2d Cir. App., pp. 383-384. Petitioners fail to inform this Court that the *pro forma* orders for pretrial statement attached to the notices of pretrial conferences were directed to *all* the parties, and *none* of the parties filed a pretrial statement until the February, 1973, conference, which was held after defendants had finally completed their discovery in the fall of 1972. Plaintiffs fully complied by filing a complete joint statement for both *Less* and *Raab*, and the defendants also filed joint statements for the two ac-

[5] Local Rule 11 provides that if the court's docket does not reflect any action for one year preceding, the clerk shall issue a notice that unless sufficient cause be given at the call of the calendar for the next term, an order of dismissal without prejudice shall be entered by the clerk as of course.

tions, although attorney McDonough did not file a statement on behalf of TIC, Taber, Manasen and Hildebrandt until two days after that conference. 2d Cir. App., pp. 254, 383-385.

6. The petitioners can cite no substantiation for the statement at page 6 of their brief that after December 1974, "plaintiff took no further positive action and continued with dilatory tactics." As has been shown, plaintiff endeavored in good faith to settle *Raab* along the same lines upon which *Less* had been settled in December, 1974, and when this failed promptly notified the court and requested that the case be scheduled to arrange for trial. 2d Cir. App., pp. 264-265, 535-536.

7. The petitioners also state, without substantiation, that the plaintiff failed to meet the deadline for response to defendants' motion to dismiss and failed to respond to defendant D'Angelo's interrogatory.

Plaintiff's response to the motion to dismiss was filed and accepted in accordance with a three-day verbal extension of the court.

The D'Angelo interrogatory served was not answered because it was objectionable as being too sweeping and burdensome, as the district court has since ruled. Following the Court of Appeals' reversal of the dismissal, D'Angelo's counsel made a motion to compel plaintiff to answer said interrogatory, which plaintiff opposed, and on February 25, 1977, the district court rendered a decision denying the motion, on the ground that the interrogatory was an improper single, sweeping, all encompassing inquiry. A copy of the district court's decision on that motion is appended hereto as Appendix A.

8. Also at page 6 of their brief, the petitioners refer to the statements in the decision of dismissal that in *Raab* the defendants had always asserted their readiness for trial and had never delayed proceedings before the court. The record is otherwise. 2d Cir. App., pp. 248-249, 251-253, 256-261, 343-344. As late as March 19, 1975, the defendants said they were not yet ready for trial, and needed more time for further discovery.[6]

The Court of Appeals took notice of this further period of delay initiated by the defendants and in contradiction of defense counsel's representations on appeal by stating in its opinion:

> The court scheduled a pretrial conference for March 19, 1975, at which time the court allowed the defendants time for additional discovery—actually extended to August 1, 1975. 546 F. 2d at 523.

9. The defendants make the surprising representation at page 15 of the petition that when they made their March, 1975, request for further discovery, *"there had been no previous discovery in the Raab case by the defendants,* and the plaintiffs had taken only one very short deposition." (Emphasis added.)

In fact, the defendants had previously taken an extensive deposition of plaintiff Raab himself. 2d Cir. App., p. 338; R. 22.

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[6] At the March 19, 1975, proceedings, after plaintiff requested early trial, defense counsel Siemer stated:

> Well, there is a matter before trial, your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to trial (*sic*) 2d Cir. App., p. 402.

In addition, the Court's attention is invited to the fact that the taking of the deposition of plaintiff Raab by defendants was initiated by counsel for the plaintiff. 2d Cir. App., pp. 305-306.

The foregoing illustrate how grossly the defendants have again misrepresented the facts and distorted the record, even to this Court.

Argument

In this case the Court of Appeals, after reviewing the facts and circumstances of the proceedings below in both the *Raab* case and in the companion *Less* case, determined that dismissal of the action for failure of prosecution under such circumstances was not justified. That determination is correct and is in conflict with no decision of this Court or other courts of appeal.

There is no valid basis for the assertion by the petitioners that the decision of the Court of Appeals is "an important new interpretation of Rule 41(b)." The decision is entirely consistent with the cases cited by the defendants, which are authority for the well settled proposition that there is no precise rule as to what circumstances justify a dismissal under Rule 41(b), and that each case must be assessed on its own facts. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Securities and Exchange Commission v. Power Resources Corp.*, 495 F.2d 297 (10th Cir. 1974).

In its decision the Court of Appeals gives due recognition to the significance of the June, 1974, agreement of the court and all counsel to defer trial of *Raab* pending the disposition of *Less*, and to the events which followed, *i.e.*, the preparations for trial of *Less*, the settlement of *Less* on the eve of trial for $560,000, the subsequent negotiations for set-

tlement of *Raab*, the request by the defendants for further postponement of *Raab* for the taking of additional discovery.

The Court of Appeals also recognized that by entering into the June, 1974, agreement and proceeding thereafter in accordance with that agreement, the defendants acknowledged that no grounds existed for dismissal of either *Less* or *Raab* for failure of prosecution. The Court of Appeals properly rejected the defendants' belated claim of prejudice because of the deaths of potential witnesses Taber and McDonough, pointing out that at the time of the defendants' agreement with the order of June 14, 1974, Taber had already been dead for over fifteen months, and that the death thereafter of McDonough (who was to be a potential witness in *Less* as well as in *Raab)* did not interfere with preparations for trial of *Less*, nor cause the defendants to raise the possibility of a motion to dismiss either *Less* or *Raab* for failure of prosecution.

The Court of Appeals further stated as follows:

> "There can be no question that all counsel, parties and the court understood and acquiesced in the above time schedule. None of the grounds, now so vigorously asserted by the appellees as preiudicial, were advanced in opposition to the court's order of June 14, 1974, or to subsequent proceedings." 546 F.2d at p. 523.

The emphasis given the foregoing circumstances by the Court of Appeals was entirely justified and correct.

The Court of Appeals rightly considered it inconceivable that the defendants could be deemed not to have waived any claim of procedural delays justifying dismissal which preceded that June, 1974, agreement. Certainly the court did not err in imposing the equitable principles of waiver and estoppel against the defendants under these circumstances. A con-

trary result would obviously have been unconscionable as to plaintiff Raab, who in good faith agreed to deferral of his action as part of said overall agreement with counsel and the court in *Less* and *Raab*.

Petitioners err in contending that the interpretation of the Court of Appeals in this action holds that the district court was prevented from examining the entire procedural history of the cases in exercising its discretion with respect to the motion to dismiss. On the contrary, the Court of Appeals expressly indicated that in its determination it had taken into account the procedural history of both *Raab* and *Less* prior to the June, 1974, agreement of counsel and the court, stating at 546 F.2d 523:

> "The two cases between May 8, 1967 (Less) and May 10, 1967 (Raab) and June 3, 1974, produced sundry depositions, notes of issue, calendar calls, pretrial conferences, etc."

The Court of Appeals determined that the pre-1974 matters belatedly raised by the defendants in their March, 1975, "diversionary tactic" (in the words of the Court) were in any event of insufficient importance to outweigh the effect of the June, 1974, agreement and the conduct of the parties in both *Less* and *Raab* from that time forward.[7]

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[7] The Court's attention is called to the fact that the defendants made an extensive presentation of the facts and circumstances urged by the defendants as the basis for upholding the dismissal in their brief of 58 pages to the Court of Appeals, with countless references to the 669-page Joint Appendix.

This case is distinguishable on its own facts from the authorities cited by the defendants

The determination of the Court of Appeals in this case turned upon the facts and circumstances present here, just as in any case involving the question of whether circumstances justify dismissal for failure to prosecute. The cases cited by the defendants in which dismissals were upheld are distinguishable on their facts from this case, for they all involve long unexcused delay on the part of the plaintiff of such nature and extent as to lull a defendant into assuming that the plaintiff did not seriously intend to bring the case on for trial, or serious violations of calendar rules or orders of the court.

Such is not the case here. Notwithstanding the exhaustive assemblage of specious detail set forth in defendants' motion to dismiss and in their briefs on appeal, replete with distortions and misrepresentations of the actual facts and circumstances of the litigation in *Less* and *Raab*, it remains undisputed that after completion of their discovery, following many delays attributable to the defendants, plaintiffs filed notes of issue for the November, 1971 trial term and answered both *Less* and *Raab* ready for trial at the call of the calendar for that term; stated that plaintiffs were ready in *Less* and *Raab* at the next calls of the cases, *i.e.*, the pretrial conferences in August, 1972, March 13, 1973, February 7, 1974 and April 29, 1974; following agreement of all counsel and the court on June 3, 1974, that *Less* proceed to trial and that *Raab* be deferred until after trial of *Less*, proceeded with preparation for trial of *Less*, and obtained settlement on the very day scheduled for trial, in the amount of $560,000. 2d Cir. App., pp. 333, 344.

As the Court of Appeals properly pointed out in its decision, the matters which the defendants belatedly claimed

as the basis for dismissal of *Raab* all took place prior to the June, 1974, agreement to defer trial of *Raab*.

None of the cases cited by the defendants involved factual circumstances remotely resembling the situation present here, wherein there was an argument to defer trial of an action until after trial of a far greater companion action, pursuant to an expressed consensus of counsel that the smaller deferred action would likely be readily settled along the same lines as those upon which the larger case was resolved.

The petitioners assert, at page 12 of their brief, that the Court of Appeals was "inordinately interested" in the settlement negotiations in *Less* and *Raab*, pointing out in its decision that the differential between the amount received by Less and the Teledyne price was $40, or $560,000 for his 14,000 shares, that *Less* was settled in November, 1974, for $560,000, and that using comparable figures the *Raab* differential would have been $25,200.

The court's reference to the settlement proceedings was entirely justified since the record shows that it was the consensus of counsel for all parties prior to the June, 1974, agreement to defer *Raab*, that once *Less* was resolved it was likely that *Raab* could be readily settled along the same lines.

The references at pages 14 and 15 of the petition to alleged "minimal delay attributable to the defendants' consideration of discovery" fails to disclose that the Siemer firm had been involved in the litigation in both *Less* and *Raab* since July of 1973, and by at least March, 1974, had become entirely familiarized with all aspects of both actions. In addition, the defendants for whom they were substituted as record counsel had formerly been represented by attorney McDonough, characterized by defendants' present counsel in the proceedings in the district court as "a distinguished and able practitioner." 2d Cir. App., p. 231. Attorney McDonough had declared his clients ready for trial in both *Less* and *Raab*, with all discovery completed, at the 1973 conference before the Magistrate.

Also, in endeavoring to excuse their untimely request in March, 1975 for further delay to take additional discovery, the defendants state that there had been no previous discovery in *Raab* by the defendants; the record shows that in fact the defendants had taken an extensive deposition of plaintiff Raab on Oct. 1, 1970. 2d Cir. App., p. 338; R. 22.

There is no important question of federal law requiring review by this court

This case involves the determination of a factual question, *i.e.*, whether under the circumstances of the litigation in both *Less* and *Raab* it was an abuse of discretion to dismiss *Raab* upon the motion made by defendants on April 29, 1975, nearly a year after the defendants, through the same counsel, had agreed to defer trial of *Raab* pending disposition of a much larger companion case. The Court of Appeals held that under these circumstances dismissal of *Raab* pursuant to such an untimely motion was not justified.

In reaching this determination the Court of Appeals also found that in view of the facts and circumstances of the combined litigation occurring both before and after that 1974 agreement, the claim of prejudice belatedly raised by the defendants was without merit.

It is evident that the decision of the Court of Appeals is entirely in keeping with the principles and interpretations applied by this Court and the other Circuit Courts with respect

to questions of discretionary dismissal for failure to prosecute, and that the decision here was based upon the special facts and circumstances of this combined litigation.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID L. SWEET,
Counsel for Respondent.

April 7, 1977.

APPENDIX A

Order of the District Court Dated February 25, 1977 Denying Motion of Defendant D'Angelo to Compel Plaintiff to Answer Interrogatory

UNITED STATES DISTRICT COURT
Western District of New York

JUNIA E. RAAB,

Plaintiff,

vs.

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of RALPH F. TABER, Deceased,

Defendants.

Civ-1967-190

The motion of defendant D'Angelo to require plaintiff to answer the interrogatory is denied. The interrogatory reads: "State in full the facts you intend to present in support of your claim that liability exists on the part of defendant Joseph P. D'Angelo." The plaintiff's description of this interrogatory as a "single sweeping, all-encompassing inquiry" is well put. *See* Vol. 4A, MOORE'S FEDERAL PRACTICE, ¶ 33.08, at 33-50, 51.

Order of the District Court Dated February 25, 1977 Denying Motion of Defendant D'Angelo to Compel Plaintiff to Answer Interrogatory

The parties are directed to meet with the court to make trial arrangements on March 23, 1977 at 9:00 a.m.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: February 25, 1977